Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1538

ROCCO MASTRANGELO and JOSEPH ADDOLORIA,

Petitioners,

-against-

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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OCTOBER TERM, 1975

NO.

ROCCO MASTRANGELO and
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-against-

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Petitioners, Rocco Mastrangelo and Joseph Addoloria respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered on February 25, 1976 which affirmed the petitioners conviction for the crimes of hijacking, conspiracy to hijack and possession of a firearm in the course of a hijacking.

OPINIONS BELOW

The petitioners judgment of conviction was filed on November 24, 1975. The judgment was affirmed by the Court of Appeals for the Second Circuit in a determination filed on February 25, 1976. Said opinions have not yet been officially reported but are made a part hereof and are set forth in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 25, 1976. The jurisdiction of this court is invoked pursuant to 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Were the petitioners denied due process of law and a fair trial by a lengthy three year pre-indictment delay?

2. Were the petitioners denied a fair trial by the action of the trial court in its attitude towards defense counsel and in its rulings which allowed the prosecutor to introduce in detail evidence of the petitioners alleged

participation in uncharged prior and subsequent crimes?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in the case at bar are the Fifth and Sixth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The petitioners, Rocco Mastrangelo and Joseph Addoloria, after having been indicted on April 8, 1975 were convicted on November 21, 1975 after a trial by jury of the federal crimes of hijacking, conspiracy to hijack and possession of a firearm during the commission of a hijacking (18 U.S.C., Sections 659, 371, 924) and were sentenced to terms of up to seven years and nine years respectively. The two men were alleged to have been part of a ring which hijacked a truck belonging to the Arlene Knitwear Company on May 3, 1972 while the said vehicle was in the process of interstate commerce with a load of knitted garments valued at approximately $25,000. The prosecution's main witness at the time

was one Paul Fleischer, a named co-conspirator involved in criminal activities for some sixteen years. Fleischer testified at the trial that the petitioners were part of a hijacking ring and in addition was allowed to testify as to the petitioners involvement in other prior and subsequent uncharged crimes.

REASONS FOR GRANTING THE WRIT

THE LONG DELAY IN PROCEEDING TO AN INDICTMENT PREJUDICED THE PETITIONERS SO AS TO DENY THEM DUE PROCESS OF LAW AND A FAIR TRIAL.

In the case at bar this court is presented with the unique opportunity of clarifying court rulings as to the applicability of the Fifth and Sixth Amendments to instances of pre-indictment delay. In the case at bar the indictment was filed on April 8, 1975 alleging the commission of crimes in March of 1972, more than three years earlier. In addition it became clear at trial from the testimony of Paul Fleischer and others that Fleischer, the government's main witness, had been cooperating with the

government since June of 1972 (T 261, 262, 270, 933)* and had given statements to the government regarding his allegations against the petitioners as far back as June of 1972.**

Since the prosecution's case at trial was in essence based solely on Fleischer's testimony there is no legitimate reason why the government should have waited three years to initiate a prosecution.

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* T - Refers to Minutes of Trial.

**The lack of a pre-trial motion regarding the issue of undue delay is based upon the fact that it became known only at trial that the government way back in 1972 was in possession of facts upon which to proceed with an indictment. Once this was revealed defense counsel promptly and vigorously raised the issue (T 1196, 1197; Minutes of Mastrangelo's Sentence, pg.3-4).

In United States v. Marion, 404 U.S. 307, this court indicated the possible applicability of the fifth and sixth amendment rights to due process of law and a fair trial where a defendant could demonstrate actual prejudice arising by the government's delay, and a purposeful design by the prosecution to gain a tactical advantage. This the Court held could occur irrespective of the Statute of Limitations. See also United States v. Napue, 401 F.2d 107 (7th Cir., 1968) cert denied 393 U.S. 1024.

Under the circumstances of this case the only inference that can be drawn is that the government deliberately delayed so as to obtain a tactical advantage in violation of explicit judicial pronouncements. See United States v. Marion, 404 U.S. 307. The prejudice to the petitioners was also severe. It must be recalled that because of the lapse of time the petitioners were unable to reconstruct the critical day in question so as to recall where they were and what they were doing on the day of the alleged hijacking. Mastrangelo in particular frankly testified that he could not remember where he was on that day (T1021, 1100). The Second Circuit in United States v. Feinberg, 383 F.2d 60 (2nd Cir., 1967) at page 65 stated:

"Though prejudice is not to be presumed it may well be that pre-arrest delay may impair the capacity of the accused to prepare his defense and if so such impairment may raise a due process claim under the fifth amendment (Powell v. U.S., 352 F.2d 705, 707) or a sixth amendment claim based upon the speedy trial guarantee, U.S. v. Simmon, 338 F.2d 806; U.S. v. Dickerson, 347 F.2d 784; Chapman v. U.S., 376 F.2d 705.

For this reason we must inquire whether there is a plausible claim of prejudice from the delay in arrest. See Jackson v. U.S., 351 F.2d 821, 823 (1965); such a claim may arise if a key defense witness or valuable evidence is lost. See Petition of Provoo, 17 FRD 183, 203 (D.Md) aff'd. 350 U.S. 856, if the defendant is unable credibly to reconstruct the events of the day of the offense, see Jackson v. U.S., 351 F.2d 823, if the present recollection of the government or defense witness is impaired,

Ross v. U.S., 349 F.2d 210 (D.C. Cal. 1965), because if any of the events occur the reliability of the proceeding for the purposes of determining guilt becomes suspect".

See also United States v. Giacalone, 477 F.2d 1277 (6th Cir., 1973).

In determining violations of the Fifth Amendment due process requirement with respect to long delays in commencing prosecutions, it appears from recent Supreme Court pronouncements that the "balancing test is applicable in which both the conduct of the prosecutor and the defendant are weighed." Barker v. Wingo, 407 U.S. 514, 530 (1972).

The exact parameters of the Fifth and Sixth Amendments applicability to pre-indictment delay, however, have not yet been clearly spelled out and there appears at the present time to be a sharp division and difference of opinion among federal jurisdiction. Thus, at approximately the same time that the Second Circuit was affirming in the case at bar, the Fourth Circuit in United States v. Jeffrey McDonald, _F2d__ (4th Cir. No. 75-1870, Jan. 1976) and the Eighth Circuit in United States v. Barkett, _F2d__ 18 CrL 2429 (8th Cir. Jan. 28,1976) took

positions in line with petitioners argument. Thus the issue presented is of substantial importance and immediate impact which requires this court's review and attention.

THE COURT BELOW COMMITTED REVERSIBLE ERROR BY ALLOWING TESTIMONY OF THE APPELLANTS' PARTICIPATION IN UNCHARGED PRIOR AND SUBSEQUENT HIJACKINGS AND IN ALLOWING COLLATERAL IMMATERIAL EVIDENCE TO SUPPORT THESE ASSERTIONS.

Prior to trial the government indicated its intention to offer as part of their direct case proof of the appellants involvement in prior and subsequent hijackings not charged in the indictment. The government contended that this evidence would be offered to show a pattern of conduct and similar acts of the petitioners. After receiving memorandum of law on behalf of both sides the trial court determined that the evidence in question was proper and admissible as showing a "common scheme or plan or design" (T 196). Thus at the very beginning of Fleischer's testimony the government brought forth the issue of the petitioners' involvement in the possession of stolen goods from the

Lerner Shop theft during the second week of January 1972 and the incident involving the Royal Merchandise Co. in February of 1972 (T 104, 106, 109). Later on the government elicited from Fleischer's testimony regarding the subsequent hijacking of Liz Cartage Co. and Splendid Form Brassiere Co. in May of 1972, some two months after the date of the instant indictment involving Arlene Knitwear. The government then even went to the extent of producing five witnesses who had absolutely nothing to do with the Arlene case but who merely testified as to aspects of these other hijackings as a means of bolstering Fleischer's testimony. Thus Howard Lowett of Splendid Form testified that a truck belonging to his company was stolen on May 5, 1972 (T 879-883), FBI Agent Klotz testified that the Splendid Truck was found five and one-half miles from Forbes Place in New Jersey (T 889-891), Agent Gilkerson stated he found items relating to the Liz Cartage theft at the C & P Warehouse (T 903-906). Andrew Coniglio stated that he did a garbage hauling job for Fleischer at C & P Warehouse and John Connell the owner of the C & P premises testified he rented the warehouse to Charles Peters on March 8, 1972. (T 859-865, 940). The prior and subsequent hijacking alluded to by Fleischer could in no way be considered to be part

and parcel of an overall intertwined scheme or design and the admission of the testimony was highly prejudicial to the petitioners and constitute reversible error. The incidents involving Lerner Shops for example were not in the nature of a hijacking but the retention of stolen goods. In addition that incident and the one involving Royal Merchandise Co. were concluded even prior to the time of a discussion and decision on the Arlene matter.* The Liz Cartage and the Splendid Form matters occurred some time two months after, at a time when the original group of conspirators had been changed in membership** and operation. It is significant to note that the C & P Warehouse at 1471 Hempstead Turnpike of which substantial testimony was allowed, was leased to Peters on March 8, 1972,

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* Although the indictment charged a conspiracy with regard to the Arlene Truck beginning on January 1, 1972, Fleischer stated that Arlene was first discussed in the third week of February 1972. (T113).

** Cesare had allegedly joined the group (T 187-189).

five days after the alleged Arlene hijacking. It is thus clear that the introduction of all of the foregoing evidence by the government did not show a common plan or scheme but was designed to prejudice the petitioners in the eyes of the jury by proving bad character and by bolstering Fleischer's testimony on collateral immaterial matters. The prosecution clearly sought to have the jury draw an inference that the petitioners were scoundrels and that Fleischer was credible on the main issues in contention by bolstering his testimony on collateral matters by extrinsic evidence.

Thus the prosecution in summation specifically referred to Fleischer's testimony regarding the other crimes and the collateral evidence to support it as "corroborating Fleischer's main testimony" (T 1272-1274).

The recently enacted rule 404(b) of the Federal Rules of Evidence provides that:

> "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It <u>may</u> however be admissible for

> other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistaken or accident."

The rule in effect codified the long standing case law in the area and continues the practice of weighing on a case by case basis the probative value of the offered evidence against its prejudice. (Weinstein on Evidence, Vol. 2, pg. 404-24, 404-66). Thus in United States v. DeCicco, 435 F.2d 478 (2nd Cir. 1970) the Court reversed a conviction for conspiracy to transport stolen goods and stated at page 484:

> "The chief government witness' testimony if believed leads ineluctably to the conclusion that the defendants knew what they were doing. . . .Therefore whatever probative value the prior crimes. . .added to the prosecution's case on the issue of defendants intent to commit the conspiracy here claimed was far outweighed by the unwarranted inference the jury was permitted to draw that the defendants. . .were a continuing band of art treasure thieves and fences."

(See also United States v. Magee, 261 F.2d 607 (7th Cir. 1958); United States v. Byrd, 352 F.2d 570 (2d Cir. 1965); United States v. Phillips, 401 F.2d 301 (7th Cir. 1968); United States v. Fierson, 419 F.2d 1020 (7th Cir. 1969); Weinstein on Evidence, § 404(10), pg. 404-66, 67, 68.)

The probative value of the evidence in question was nil. The prosecution's case on the charges alleged in the indictment stood on its own if the testimony of direct involvement of the petitioners as related by Fleischer was believed by the jury. Thus no legitimate purpose was served by the introduction of the evidence in question. While the probative value was nil the prejudice to the petitioners was great. Having the jury hear testimony as to a series of other hijackings and then listening to witnesses corroborate details of these other hijackings certainly denied the petitioners a fair trial and a determination based solely on their guilt or innocence of the crimes charged. Throughout the admission of the foregoing prejudicial evidence defense counsel repeatedly objected and on numerous occasions requested a mistrial (T 878, 891,923,956).

In the case at bar there also developed from the beginning of the case until its conclusion friction between and a degree of hostility by the trial judge toward Mr. Mastropieri, the attorney for the petitioner Mastrangelo. Thus during the course of the proceedings the court below imposed a fine on defense counsel of $100. (T1382) and on numerous instances criticized him personally for his handling of the case both in front of and out of the presence of the jury. Thus the record reveals that the court accused Mr. Mastropieri of misrepresenting facts during a period of cross-examination (T 440, 443) of engaging in "improper conduct that could be referred to the bar association" (T636, 637) and of confusing facts before the jury (T 682). The court at one point specifically told the jury:

> "Now this is the second time Mr. Mastropieri has done this and I caution you that the fact that Mr. Mastropieri asks such a question does not indicate that there is any basis for it and indeed there was apparently no such basis in this case.
>
> You have to be careful. The fact that he asks a question

> that incorporates a fact does not mean it is true unless confirmed by the witness. Twice now this has happened by Mr. Mastropieri where he had no business asking the question." (T 476)

These remarks served to belittle, humiliate, and intimidate defense counsel for Mastrangelo and had a spill over effect with regard to both petitioners. Thus because of these circumstances the petitioners were denied the fundamentals of a fair trial and a full review of the issues by this Court is warranted.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX A

THE INDICTMENT

Cr. No._____
(T. 18, U.S.C., §659, §371, §924(c) (1), (2) and §2)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

CHARLES PETERS,
GERARD COLLINS, a/k/a "Rebel",
PAUL FLAMMIO,
ROCCO MASTRANGELO, a/k/a "Rocky",
JOSEPH ADDOLORIA, a/k/a "Joe Baldy",
CHARLES FORBES and
GERALD BARRY,

Defendants.
- - - - - - - - - - - - - - - - - - - X

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 3rd day of March 1972, within the Eastern District of New York, the defendants CHARLES PETERS, GERARD COLLINS, also known as "Rebel",

PAUL FLAMMIO, ROCCO MASTRANGELO, also known as "Rocky" and JOSEPH ADDOLORIA, also known as "Joe Baldy", with intent to convert to their own use, did wilfully and knowingly embezzle, steal and unlawfully take from a motortruck belonging to the Arline Knitwear Company, Brooklyn, New York, a quantity of women's knitted garments, having a value in excess of One Hundred Dollars ($100.00), which goods were moving as and constituting an interstate shipment of freight from New York to New Jersey. (Title 18, United States Code, Section 659 and 2)

COUNT TWO

On or about and between the 1st day of January 1972 and the 7th day of March 1972, both dates being approximate and inclusive, within the Eastern District of New York, the defendants CHARLES PETERS, GERARD COLLINS, also known as "Rebel", PAUL FLAMMIO, ROCCO MASTRANGELO, also known as "Rocky", JOSEPH ADDOLORIA, also known as "Joe Baldy", CHARLES FORBES and GERARD BARRY, along with Paul Fleischer, named herein as a co-conspirator but not as a co-defendant, and others known and unknown to the Grand Jury, did knowingly and wilfully conspire to commit offenses against the United States, in violation of Title 18, United States Code, Section 659, by conspiring to unlawfully take

from a motortruck belonging to the Arline Knitwear Company, Brooklyn, New York, a quantity of women knitted garments, having a value in excess of One Hundred Dollars ($100.00), which goods were moving as and constituting an interstate shipment of freight from New York to New Jersey, and further, to unlawfully receive and have in their possession the said garments, the aforesaid defendants knowing the same to have been stolen.

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, within the Eastern District of New York and elsewhere, the defendants CHARLES PETERS, GERARD COLLINS, also known as "Rebel", PAUL FLAMMIO, ROCCO MASTRANGELO, also known as "Rocky", JOSEPH ADDOLORIA, also known as "Joe Baldy", CHARLES FORBES and GERALD BARRY committed among others the following:

OVERT ACTS

1. In or about January 1972, within the Eastern District of New York, the defendants CHARLES PETERS, GERARD COLLINS, also known as "Rebel", PAUL FLAMMIO, ROCCO MASTRANGELO, also known as "Rocky" and JOSEPH ADDOLORIA, also known as "Joe Baldy", along with co-conspirator Paul Fleischer met in Queens, New York.

2. On or about March 3, 1972, the defendant CHARLES FORBES had a telephone conversation with the defendant ROCCO MASTRANGELO, also known as "Rocky", in New York, New York.

3. On or about March 3, 1972, the defendant GERALD BARRY drove a tow truck from New Jersey to New York, New York. (Title 18, United States Code, Section 371).

COUNT THREE

On or about the 3rd day of March 1972, within the Eastern District of New York, the defendants CHARLES PETERS, GERARD COLLINS, also known as "Rebel", PAUL FLAMMIO, ROCCO MASTRANGELO, also known as "Rocky" and JOSEPH ADDOLORIA, also known as "Joe Baldy", knowingly, intentionally, wilfully and unlawfully carried and used a firearm, during their commission of an offense for which they may be, and are being, prosecuted in a Court of the United States, to wit: the theft of a quantity of women's knitted garments, having a value in excess of One Hundred Dollars ($100.00), which goods were moving as and constituting an interstate shipment of freight, in violation of Title 18, United States Code, Section 659, which offense

is set forth in Count One above. (Title 18, United States Code, Sections 924(c)(1), (2) and Title 18, United States Code, Section 2)

A TRUE BILL.

_____
FOREMAN

_____
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

APPENDIX B

JUDGMENT OF CONVICTION
(Mastrangelo)

DOCKET NO.
75 CR 275

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

ROCCO MASTRANGELO, a/k/a Rocky,

Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER
In the presence of the attorney for the government the defendant appeared in person on this date

MONTH	DAY	YEAR
11	21	1975

COUNSEL - WITH COUNSEL - E. MASTROPIERI, Esq.

PLEA - GUILTY, and the court being satisfied that there is a factual basis for the plea,

NOLO CONTENDERE, NOT GUILTY

There being a finding/verdict of xxx GUILTY, in Counts 1, 2 and 3.

FINDING & JUDGMENT - Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C. Sec. 659, 371, 924(c)(1), 2 in that on or about and between Jan. 1, 1972, and March 7, 1972, both dates being approximate and inclusive, and on or about March 3, 1972, the defendant knowingly and wilfully did conspire to commit offenses against the U.S., by conspiring to, and to wilfully and knowingly embezzle, steal, and unlawfully take from a motortruck a quantity of women's knitted garments, having a value in excess of $100.00, which goods were moving as an interstate shipment of freight from N.Y. to N.J. and the defendant wilfully and unlawfully carried and used a firearm during his commission of an offense, to wit: the theft of a quantity of women's knitted garments, having a value in excess of $100.00.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of

the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE OR PROBATION ORDER - IT IS ADJUDGED on count 1 that the defendant is hereby committed to the custody of the Attorney General or his duly authorized or his authorized representative for a period of 7 years on count one pursuant to T-18, U.S. Code, Sec. 4208 (a) (2)

IT IS ADJUDGED on count 2 that the defendant is hereby committed to the custody of the Attorney General or his duly authorized representative for a period of 5 years pursuant to T-18, U.S. Code, Sec. 4208(a)(2) - defendant to serve sentence concurrently with count 1.

SPECIAL CONDITIONS OF PROBATION - IT IS ADJUDGED on count 3 that the defendant is hereby committed to the custody of the Attorney or his authorized representative for imprisonment for a period of 7 years. Execution of sentence is suspended and the defendant is placed on probation for a period of 5 years; sentence imposed in count 3 to run consecutively with sentences imposed in counts 1 and 2.

ADDITIONAL CONDITIONS OF PROBATION - In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

s/ Thomas C. Platt
U.S. District Judge

Date 11/24/75

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
NOV 21 1975

APPENDIX C

JUDGMENT OF CONVICTION
(ADDOLORIA)

DOCKET NO.
75 CR 275

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

JOSEPH ADDOLORIA a/k/a Joe Baldy

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date

MONTH	DAY	YEAR
11	21	1975

COUNSEL - WITH COUNSEL - Harold Goerlich, Esq.

PLEA - GUILTY, and the court being satisfied that there is a factual basis for the plea,

NOLO CONTENDERE NOT GUILTY

There being a finding/verdict of xxx Guilty, in Counts 1, 2 and 3.

FINDING & JUDGMENT - Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C. Sec. 659, 371 924(c)(1), 2 in that on or about and between Jan 1, 1972, and March 7, 1972, both dates being approximate and inclusive, and on or about March 3, 1972, the defendant, knowingly and wilfully did conspire to commit offenses against the U.S., by conspiring to, and to wilfully and knowingly embezzle, steal, and unlawfully take from a motortruck, a quantity of women's knitted garments, having a value in excess of $100.00, which goods were moving as an interstate shipment of freight from N.Y. to N.J. and the defendant wilfully and unlawfully carried and used a firearm during his commission of an offense, to wit: the theft of a quantity of women's knitted garments, having a value in excess of $100.00.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of

the Attorney General or his authorized representative for imprisonment for a period of 9 years on count 1 pursuant to T-18, U.S.C. Sec. 4208(a)(2).

SENTENCE OR PROBATION ORDER - IT IS ADJUDGED on Count 2 that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 5 years pursuant to T-18, U.S.C. Sec. 4208(a)(2); sentence in count 2 to run concurrently with sentence imposed in count 1.

SPECIAL CONDITIONS OF PROBATION - IT IS ADJUDGED on Count 3 that the defendant is hereby committed to the custody of the Attorney or his authorized representative for imprisonment for a term of 9 years. Execution of sentence is suspended and the defendant is placed on probation for a period of 5 years; sentence in count 3 to run consecutively with the sentences imposed in counts 1 and 2.

ADDITIONAL CONDITIONS OF PROBATION - In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation,

reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

s/ Thomas C. Platt
U.S. District Judge

Date 11/24/75

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
NOV 21 1975

APPENDIX D

ORDER OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of February one thousand nine hundred and seventy-six.

Present: HON. WALTER R. MANSFIELD
HON. WILLIAM H. TIMBERS
HON. THOMAS J. MESKILL

Circuit Judges,

75-1411
76-1019

United States of America,
Plaintiff-Appellee

v.

Charles Peters, Gerard Collins, a/k/a "Rebel", Paul Flammio, Rocco Mastrangelo, a/k/a "Rocky", Joseph Addoloria, a/k/a "Joe Baldy", Charles Forbes and Gerald Barry,
Defendants

Rocco Mastrangelo, a/k/a "Rocky", Joseph Addoloria, a/k/a "Joe Baldy",
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

By
Vincent A. Carlin
Chief Deputy Clerk

Supreme Court, U. S.
FILED
AUG 2 1976
JR., CLERK

No. 75-1538

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROCCO MASTRANGELO AND JOSEPH ADDOLORIA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1538

ROCCO MASTRANGELO AND JOSEPH ADDOLORIA,
PETITIONERS

v.

UNITED STATES OF AMERICA

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OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a-15a) was entered on February 25, 1976. The petition for a writ of certiorari was filed on April 23, 1976, and is therefore untimely under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether three years' pre-accusation delay denied petitioners due process of law.

2. Whether the trial court erred in admitting evidence of other crimes.

3. Whether the trial court denied petitioners a fair trial by admonishing petitioner Mastrangelo's counsel not to misrepresent facts before the jury.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of theft from a shipment moving in interstate commerce (Count 1), conspiracy to commit that theft (Count 2), and use of a firearm in the theft (Count 3), in violation of 18 U.S.C. 659, 371, and 924 (c)(1) and (2).[1] Petitioner Mastrangelo was sentenced to concurrent terms of seven and five years' imprisonment on Counts 1 and 2, respectively, with parole eligibility pursuant to 18 U.S.C. 4208(a)(2). A sentence of seven years' imprisonment on Count 3 was suspended in favor of five years' probation to follow the imprisonment. Petitioner Addoloria was sentenced to concurrent terms of nine and five years' imprisonment on Counts 1 and 2, respectively, with parole eligibility pursuant to 18 U.S.C. 4208(a)(2). A sentence of nine years' imprisonment on Count 3 was suspended in favor of five years' probation to follow the imprisonment. The court of appeals affirmed without opinion.

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[1]Five other defendants were charged in the indictment. Charles Peters, Gerard Collins and Paul Flammio pleaded guilty to use of a firearm during a theft from interstate commerce. Charles Forbes was convicted after a jury trial of conspiracy to commit the theft; his conviction is pending on appeal (C.A. 2, No. 76-1146). Gerald Barry pleaded guilty to a charge of being an accessory after the fact.

In related prosecutions, Paul Fleischer pleaded guilty to a charge of theft from interstate commerce. Gerald Allicino and Seymour Rosenwasser were convicted of receiving stolen goods and conspiracy; the latter's conviction is pending on appeal (C.A. 2, No. 76-1260). Soloman Broverman and Eugene Santore were convicted of receiving stolen goods and conspiracy. Broverman's conviction has been affirmed (C.A. 2, No. 76-1037, decided June 7, 1976). Lawrence Cesare pleaded guilty to possessing stolen goods.

In January 1972 petitioners and Paul Fleischer[2] joined a group organized by Charles Peters to hijack trucks (Tr. 72-74, 87-91). The group met almost daily to discuss plans (Tr. 94-97). They first stole merchandise belonging to the Lerner Shops from a truck at Kennedy Airport (Tr. 98, 101-102). In mid-February they stole a truckload of tools from the Royal Merchandise Company (Tr. 113). On March 3, 1972, they hijacked an Arlene Knitwear Company truck containing merchandise (Tr. 128, 135-137).[3] Petitioner Addoloria helped to break into the Arlene Knitwear truck; he and petitioner Mastrangelo helped to unload the merchandise from the truck (Tr. 142-143). In early May 1972, the group stole trucks containing goods being carted by the Liz Cartage Company (Tr. 193-200) and goods belonging to the Splendid Form Brassiere Company (Tr. 204-206, 210-211). The proceeds from the sale of the stolen goods were divided among the conspirators (Tr. 105-112, 173-174, 188-189).

Petitioner Mastrangelo denied planning or engaging in any hijacking (Tr. 1021, 1031, 1047-1048). He claimed he was unable to recall his whereabouts on March 3, 1972, the date of the Arlene Knitwear hijacking (Tr. 1021). Petitioner Addoloria presented no evidence (Tr. 1165).

ARGUMENT

1. Petitioners contend (Pet. 4-9) that the delay between their crimes in February 1972 and their indictment in April 1975 denied them due process of law. *United States* v. *Marion*, 404 U.S. 307, 324, indicated

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[2]Fleischer testified at trial on behalf of the prosecution.

[3]This theft is the basis for the substantive counts of the indictment.

that a denial of due process occurs only where pre-accusation delay results in actual prejudice to the conduct of the defense and is intentionally caused by the government to gain a tactical advantage. Although the courts of appeals are divided over whether both elements must be shown (see *infra*, pp. 5-6), petitioners have not shown either prejudice or prosecutorial overreaching.

Petitioner Mastrangelo asserts that he was prejudiced because he was unable to remember what he did on the day of the Arlene Knitwear hijacking. The defendant's faded memory alone, however, is insufficient to establish prejudice. *United States* v. *Jones*, 524 F. 2d 834, 843 (C.A. D.C.); *United States* v. *Zane*, 489 F. 2d 269 (C.A. 5), certiorari denied, 416 U.S. 959; *United States* v. *Broadway*, 477 F. 2d 991, 996 (C.A. 5); *United States* v. *Griffin*, 464 F. 2d 1352, 1354-1355 (C.A. 9), certiorari denied, 409 U.S. 1009. In any event, the case against petitioner Mastrangelo did not depend on the events of a single day; it reflected his participation in events that covered a span of months. Petitioner Mastrangelo has not alleged that he has forgotten all of his activities between January and May 1972. Moreover, petitioner Addoloria does not assert that *his* memory has faded, and he makes no claim of prejudice whatsoever.

Petitioners' assertion that the delay was a deliberate act by the prosecution to obtain a tactical advantage is groundless speculation. This claim is based on the fact that Fleischer, one of the conspirators and the prosecution's main witness, met in June 1972 with an agent of the Federal Bureau of Investigation after he and his family were threatened by defendant Peters (Tr. 256-264).

Fleischer gave the agent a statement concerning the prior hijackings (Tr. 273-274, 651)[4] and later acted as an informant (Tr. 264-268, 933). Petitioners urge that the delay between the beginning of Fleischer's cooperation and the return of the indictment gives rise to an inference of prosecutorial overreaching. But the evidence also showed that the investigation continued at least until mid-1974, when some of the stolen Arlene Knitwear goods were recovered (Tr. 710-713, 717-720). The government kept Fleischer's identity as an informant secret until 1975 (Tr. 933). It may be inferred from this that the delay resulted from the need for further investigation and to protect the informant until the investigation was complete.[5] Nothing in the record indicates an improper purpose for the delay.

The circuits are in conflict on the question whether, in addition to prejudice, intentional delay to obtain a tactical advantage also is necessary for dismissal of an indictment for pre-accusation delay. We are seeking review of this question in *United States* v. *Lovasco*, 532 F. 2d 59 (C.A. 8), petition for a writ of certiorari pending, No. 75-1844.[6] There is, however, no reason to defer ruling in the instant case. Petitioners' claim fails, whatever

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[4]The statement was not introduced into evidence, although it was used by petitioner Mastrangelo's counsel during his cross-examination of Fleischer (Tr. 651-654).

[5]The reason for the delay might have been revealed in greater detail if the federal agent who took Fleischer's statement had been questioned at trial (Tr. 915-918). Petitioner Mastrangelo's counsel specifically rejected that line of inquiry (Tr. 929).

[6]*Lovasco* is similar to *United States* v. *Barket*, 530 F. 2d 189 (C.A. 8), upon which petitioners rely (Pet. 8-9). But see *United States* v. *Naftalin*, 534 F. 2d 770 (C.A. 8) (four and one-half year pre-accusation delay is permissible in the absence of prejudice to defendants).

may be the ultimate ruling in *Lovasco*,[7] since the trial record does not establish either prejudice or intentional tactical delay.

2. Petitioners contend (Pet. 9-14) that evidence of prior and subsequent similar criminal acts was improperly admitted. But petitioners and five others were charged with conspiracy between January 1, 1972, and March 7, 1972, to hijack the Arlene Knitwear truck. The "other crime" evidence to which petitioners object was admissible to show the purpose and scope of the conspiracy. It also was admissible to show that the Arlene Knitwear hijacking was part of a unitary scheme, and that it had been prepared and carried out as part of an overall plan.[8] Fed. R. Evid. 404(b); *United States* v. *Carroll*, 510 F. 2d 507, 509 (C.A. 2); *United States* v. *Smith*, 504 F. 2d 560, 561 (C.A. 5); *United States* v. *Chrzanowski*, 502 F. 2d 573, 575 (C.A. 3); *United States* v. *Arias-Diaz*, 497 F. 2d 165, 170 (C.A. 5), certiorari denied, 420 U.S. 1003.[9]

---

[7]Petitioners' reliance (Pet. 8-9) on *United States* v. *MacDonald*, 531 F. 2d 196 (C.A. 4), petition for a writ of certiorari pending, No. 75-1892, is misplaced. So far as it is relevant here, the decision in *MacDonald* dealt with the Speedy Trial Clause of the Sixth Amendment, which does not apply to pre-accusation delay. *United States* v. *Marion*, *supra*, 404 U.S. at 313-320.

[8]The jury was thoroughly instructed that the evidence of similar acts was admitted only to show plan, scheme, or design (Tr. 196, 199, 204, 1348-1349).

[9]The decision below is in accord with the rule in the Second Circuit. As that court observed in *United States* v. *Gerry*, 515 F. 2d 130, 141, certiorari denied, 423 U.S. 832:

> The rule in this Circuit as to prior criminal activity is in the inclusionary form and holds that evidence of other crimes is admissible except when offered solely to prove criminal character. [Citations omitted.]

See *United States* v. *Santiago*, 528 F. 2d 1130, 1134 (C.A. 2). Insofar as *United States* v. *DeCicco*, 435 F. 2d 478 (C.A. 2), upon which petitioners rely (Pet. 13-14), is inconsistent with these cases, it presents only an intra-circuit conflict that this Court need not address. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

3. Petitioners argue that they were denied a fair trial because the trial judge maintained a "hostile attitude" toward petitioner Mastrangelo's attorney, Eugene Mastropieri (Pet. 15-16). They point to the following admonition of the trial judge to the jury (Tr. 476):

> Now this is the second time Mr. Mastropieri has done this [implied a fact without basis] and I caution you that the fact that Mr. Mastropieri asks such a question does not indicate that there is any basis for it and indeed there was, apparently, no such basis in this case.
>
> You have to be careful. The fact that he asks a question that incorporates a fact does not mean it is true unless confirmed by the witness. Twice now this has happened by Mr. Mastropieri where he had no business asking the question.

The instruction was given during Mastropieri's cross-examination of Fleischer. After an objection the trial judge satisfied himself that the question had no basis (Tr. 474-475). The instruction was both restrained and necessary; it did not deprive petitioners of a fair trial.[10]

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[10]The district court's patience undoubtedly had been strained. Mr. Mastropieri persisted in asking Fleischer irrelevant, misleading, and factually groundless questions (Tr. 414, 416-419, 427, 453-454, 462, 474-475, 507, 509-510, 580, 595). He was warned by the trial judge on numerous occasions outside the presence of the jury to abstain from such conduct (Tr. 415-416, 429-436, 440-446, 475-476, 631-640, 675-676).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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In The

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ROCCO MASTRANGELO and JOSEPH ADDOLORIA,

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vs.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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APPENDIX

Appendix A — Argument on Motion in District Court Prior to Trial 1a

In The

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

The petitioners respectfully submit the following reply to the government's answering brief to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. The Opinion Below, Jurisdiction, and Questions Presented are the same as in the government's answering brief.

REPLY ARGUMENT

In the case at bar, the indictment filed on April 8, 1975 alleged the commission of crimes in March, 1972, more than three (3) years prior to the indictment.

In addition, it became clear at trial from the testimony of Paul Fleischer and others, that Fleischer, the government's main witness had been *cooperating* with the government since June of 1972 (T261, 262, 270, 933), and had given statements and information regarding his allegations against the petitioners as far back as *June of 1972.*

There has been a period of approximately three (3) years in delay from June of 1972 to April 8, 1975. Under the Second Circuit Rules, the government in all cases must be ready for trial within six months from the date of arrest, service of summons, detention or filing of a complaint, whichever is earliest.

Under Second Circuit Rule 4, it is not required that the defendant be tried within this period of time, but only that the government be ready for trial. The testimony of Paul Fleischer indicated that he supplied said information in June, 1972 and your petitioners were not informed nor brought to trial within this period, but three (3) years later. The case at bar clearly presents that if the defendants have the undefined duty to enforce their right to a speedy trial and if this burden is placed on the defendants, how can they comply if they are not informed of said charges?

Since the possibility of prejudice is inherent even in short delays, it seems fair to apply speedy trial limitations from the "earliest identifiable stage" of the criminal process. The prosecutor can avoid operation of the prescribed time periods simply by delaying the arrest and indictment of the defendant. See, *Harling v. United States,* 401 F.2d 392, 395 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1069 (length of delay may establish prejudice as a matter of law).

When the Sixth Amendment, the right to a speedy trial, is at stake, it may be equally realistic and necessary to assume prejudice once the accused shows that he was denied a rapid prosecution. The difficulty in such an approach, of course, lies in determining how long a prosecution must be delayed before prejudice is assumed:

> "the testimony in your Grand Jury Minutes in March of this year 1975, is different than the statement that you gave the F.B.I. in June 1972." (T691).
>
> "As a result of those statements, later on I got indicted, yes.
>
> Q. As a final result you did get indicted? A. Yes." (T376).
>
> "didn't he say that if you testified on some of these cases and tell us all about them, we will give you a new identity, and then you can start clean? Not the agent, 'somebody' told you that didn't they? A. Yes.
>
> Q. Who? A. United States Attorney.
>
> Q. When did he tell you that? A. In 1972, I think." (T358).

Despite the difficulties in proving actual harm in most cases, it seems that inherent in prosecutorial delay is "potential substantial prejudice" (*United States v. Wade,* 388 U.S. 218, 227 (1967)), to the interest protected by the speedy trial clause. The speedy trial safeguard is premised upon the reality that fundamental unfairness is likely in overlong prosecutions.

One court has stated that "We think that a showing of prejudice is not required when a criminal defendant is asserting a

constitutional right under the Sixth Amendment." Thus some courts have shifted the burden of proof to the government after long delay. *E.g., Williams v. United States,* 102 U.S. App. D.C. 51, 53-54, 250 F.2d 19, 21-22 (1957). Although prejudice seems to be an essential element of speedy trial violations, it does not follow that prejudice or its absence — if the burden of proof is on the government — can be satisfactorily shown in most cases. Certainly, as in the present case at bar, it is obvious that the government has delayed in clear bad faith.

There was no new evidence submitted in petitioners' case, nor were they informed that a complaint was issued in June of 1972.

In requiring defendants to show actual prejudice, federal courts have only confused the meaning and the enforcement of the constitutional right to a speedy trial.

By substituting the more definite standard of the passage of a specified time period, all four proposals under examination by this Court will lift an intolerable burden of enforcing the speedy trial. Guarantee will shift to the place where it belongs — the courts and society.

Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult, and it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses. As was stated in the case of *Ross v. United States,* 121 U.S. App. D.C. 233, 238, 349 F.2d 210, 215 (1965). The witnesses' failure of memory and their inability to reconstruct what they did not remember virtually precluded showing in what respects petitioners' defense might have been more successful if the delay had been shorter. In addition, the death of a witness prejudiced the petitioners due to the government's three year delay.

"A. You see, I had some records, but as I gave up the office on 2 West End Avenue because my wife died, some of the records got lost and I couldn't find them.

Q. Now, do you recall the year 1971 and 1972, those two years? A. I can only say how I treated this patient during this time, but I can't pinpoint because I don't have the records for those years so I cannot pinpoint it.

Q. Do you know when the last time you treated Rocky Mastrangelo was? A. Well, lately I didn't see him too often, but I did see him from — for a series of six, seven or eight years almost once a week, sometimes twice a week, sometimes every day because this was a strange, unusual case. Since we, discovered — should I give the story of the whole condition?" (Dr. Henri Ringelheim, T964, 965).

Also during this period of delay, *Mr. Sam Weinar* died. Petitioners believe that his testimony would have completely discredited the testimony of *Paul Fleischer.* Federal courts generally have held prejudice to be an essential factor in a constitutionally based finding of a speedy trial violation. See *United States v. Halley,* 431 F.2d 1180, 1182 (9th Cir.), *cert. denied,* 401 U.S. 916, *rehearing denied,* 401 U.S. 1004 (1970); Note, *The Right to a Speedy Trial,* 20 Stan. L. Rev. 476, 493 (1968).

The burden of showing prejudice usually rests with the defendant who may be required to show not only that the delay was prejudicial, but also that the government intended to harm the defense by the delay.

Courts have recognized that the potential for substantial prejudice inherent in the denial of any of these safeguards is so

great and the process of showing actual harm is so difficult, that prejudice must be assumed in order to protect effectively the important constitutional rights at issue. The presumption of prejudice should also extend to the speedy trial right, at least where delay is substantial. Prejudice, of course, should be assessed in light of the interest of defendants which speedy trial right was designed to protect. The Court has identified two such interests:

(i) to prevent oppressive pretrial incarceration;

(ii) to limit the possibility that the defense will be impaired. See *United States v. Ewell,* 383 U.S. at 120 (1966).

Of these, the most serious is the last because the inability of a defendant to prepare his case adequately, shows the unfairness of the system in this respect. If witnesses die, or disappear during a delay, the prejudice is obvious. There is also prejudice if the defense witnesses are unable to recall accurately events of the distant past.

> "Q. Now, agent Gilkerson, as you sit here today, do you have an independent recollection of everything that was seen and seized on that day? A. No.
>
> Q. Could your recollection be refreshed by your referring to your reports of that day? A. Yes." (Agent Gilkerson, T907).

Surely if the defendants and witnesses could not remember dates, times, places, and without the benefit of reports that were missing in some instances due to the delay in prosecution, it seems obvious, that even Agent Gilkerson, had to request written reports to refresh his memory due to the long period from the time the information was submitted to the time of indictment. Deliberate governmental delay in the hopes of obtaining an advantage over the accused in not unknown. In

such a circumstance, the fair administration of criminal justice is imperiled. The speedy trial guarantee that serves the public interest by preventing official abuse of due process and discouraging official lawlessness, was absent in this case. See *e.g., United States v. Provoo,* 17 F.R.D. 183 (D.C. Md.), *aff'd per curiam,* 350 U.S. 857 (1955). Thus this guarantee protects our common interest that government prosecute — not persecute — those whom it accuses of crime.

The government might appropriately bear this burden since it, far more than the defendant, is likely to know why the delay took place.

TO FURTHER DEMONSTRATE THE ISSUE THAT THE GOVERNMENT DELAYED THE PROSECUTION:

United States v. Paul Fleischer, No. 75-CR-275

71-CR-984

9/9/71, Indictment filed

11/11/71, Government's Notice of Readiness for Trial Filed.

A period of (63) days in which the government was ready for trial (see, Second Circuit Rule 4).

72-CR-12-1972 — Superseding Indictment Filed, Trial date set for Feb. 28th, 1972, a period of 14 days after new indictment filed.

It is not the duty of a defendant to assert that he be indicted under penalty of waiving his right to a speedy trial should he fail to do so. It is the duty of the public prosecutor not only to prosecute those charged with crime, but also to observe the constitutional mandate guaranteeing a speedy trial. If a prosecutor fails to do so, the defendant cannot be held to have

waived his constitutional right to a speedy trial. *United States v. Dillon,* 183 F. Supp. 541, 543 (1960). The defendant in any event cannot force the beginning of his trial, even if he takes affirmative steps to that end. The present case provides a striking instance of this fact. The government, on the other hand, can and does set the case for trial at any time, thus constitutional right aside — the government must reasonably bear the burden of going forward with trial since it alone has the ultimate capacity to do so. The burden, moreover, might reasonably fall on the government since the prosecutor is the initiating party in criminal proceedings. *Cf.* Fed. Rule Crim. Proc. 41(b) (dismissal for failure to prosecute by the plaintiff).

The delay must not be purposeful or oppressive. There is no absolute test as to what constitutes purposeful delay. Bad faith or chicanery on the part of the government is not a necessary element. It is enough if the government has made a deliberate choice for a supposed advantage which caused as much oppressive delay and damage to the defendants as it would have caused if it had been made in bad faith. In the instant case, it appears that the government has made a deliberate choice to hold the criminal prosecution in abeyance. As a result of that choice, delay has ensued and fruits of the proceedings have undoubtedly aided the government with respect to its prosecution. Conversely, the choice has damaged and prejudiced the petitioners.

The criminal nature of delays in criminal trial has sparked interest in the long ignored Sixth Amendment (the right to a speedy trial), once called "one of the most basic rights preserved by our Constitution." Unlike the speedy trial right guaranteed by most state constitutions, the federal constitutional right has not been defined precisely either by judicial decision or by legislative enactment:

> "The only federal provision directly concerned with delay before trial provides only that if there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing the defendant to trial, the court may dismiss the indictment, information or complaint." Fed. R. Crim. Proc. 48(b).

Indeed, the Court's reluctance to specify standards for adjudication of speedy trial claims prompted the Honorable Justice Brennan to note that "many — if not most of the basic questions about the scope and content of the speedy trial guarantee remain to be resolved."

Not only have petitioners been denied their right to a speedy trial under the Sixth Amendment, but Mastrangelo's counsel Mastropieri's handling of the case in the District Court and his conduct, created a prejudicial effect upon the jury. The error substantially affected both petitioners' legal rights and obligations. See *Code of Professional Responsibility and Code of Judicial Conduct,* American Bar Association, April 1975:

Canon 7:

> *"A lawyer should represent a client zealously within the bounds of the law."*

Ethical Considerations, Duty of the Lawyer to the Adversary System of Justice:

EC 7-36:

> "Judicial hearing ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings." *Cf.* ABA Canon 18.

> "While maintaining his independence, a lawyer should be respectful, courteous, and aboveboard in his relations with a judge or hearing officer before whom he appears." ABA Canons 1 and 3.

In reference to the Disciplinary Rules:

> DR 7-101(3):
>
> ". . . prejudice or damage his client during the course of the professional relationship." *Cf.* ABA Canon 24.

The conduct of counsel cannot be questioned by petitioners but only submitted to this Court for review. Counsel Mastropieri, in argument, stated that the remarks made by the trial judge served to belittle, humiliate and intimidate him. These issues were resolved by the court, but the impact of the prejudice inflicted upon the jury can only reach one conclusion, that your petitioners were denied a *fair, unprejudiced* and *speedy* trial.

CONCLUSION

For these constitutional violations, petitioners pray that a writ of certiorari be granted.

Respectfully submitted,

s/ Harold L. Goerlich
Attorney for Petitioners

APPENDIX A

ARGUMENT ON MOTION IN DISTRICT COURT PRIOR TO TRIAL

ARGUMENT

EVIDENCE OF THE PROPOSED SIMILAR CRIMINAL ACTS NOT CHARGED IN THE INDICTMENT IS INADMISSIBLE IN THIS TRIAL

Rule 404(b) excludes evidence of other crimes to show the character of the defendant, but then sets forth certain instances in which such evidence may be admissible:

> It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The word "may" was purposely included in this sentence to give latitude and discretion to the trial court. The original draft of the section was as it appeared in the final draft and was then revised so as to begin: "This subdivision does not exclude the evidence when offered. . ." This was done at the request of the Department of Justice (Department of Justice, Report 11-12, 1971; Suggestions of United States Attorney, Washington, D.C., 1971).

However when the revised draft was presented to Congress it was promptly changed back to its original form so as to allow the trial court to consider whether the probative value of the evidence is substantially outweighed by its prejudice. (Weinstein's Evidence, Vol. 2, p. 404-46).

Thus the question of probative value versus prejudice is left to the trial court.

Appendix A

Judge Weinstein endeavored to reconcile the cases, and set forth some generalizations, stating however,

> In each individual case, the trial judge must decide whether the proffered evidence tends to make a consequential fact more or less probable. (Weinstein's Evidence, supra P. 404-50)

The generalizations are as follows:

Criminal intent and knowledge. Where the defendant seeks to explain his act as innocently done, similar acts would be admissible. In *United States v. DeCicco,* 435 F2d 478 2d Cir. 1970, certain guidelines were innumerated by the Second Circuit for when evidence of similar acts may be admitted. The Government in *DeCicco,* supra, wherein the charge was that of transportation of stolen goods in interstate commerce, introduced evidence of prior similar acts to prove intent. The Court stated that prior similar acts may be admitted to prove intent, but only where the question of intent is placed in issue. Such admission was found to be an abuse of discretion, the Court holding that the Government's case did not raise any substantial issue of intent, nor did the defense attempt to concede the act while disclaiming intent. The chief Government witness' testimony "if believed leads ineluctably to the conclusion that the defendants knew what they were doing. . . . Therefore whatever probative value the prior crimes of (the defendants) added to the prosecution's case on the issue of defendants' intent to commit conspiracy . . . was far outweighed by the unwarranted inference the jury was permitted to draw that the defendants were a continuing band of art thieves and 'fencers'." *U.S. v. DeCicco,* supra.

The rule that the element of intent must be a substantial issue in the trial to allow proof of similar acts to show intent finds strong support in this Circuit. The element of intent must

Appendix A

be placed in issue "either by the nature of the facts sought to be proved by the prosecution or the defense. *U.S. v. Byrd,* 352 F2d 570 and 575 2d Cir. 1965. Should the defendant in opening put intent in issue, such evidence would be admissible on the direct case. *U.S. v. Cohen,* 489 F2d 945, 2nd Cir. 1973.

In the case at hand, the evidence sought to be admitted is that of *subsequent* similar acts. It would seem logical that the rule of *DeCicco* that evidence of similar acts should be admitted only where the question of intent is placed in issue, should be followed even more stringently where the alleged acts occurred subsequent to the act charged in the indictment.

In *Hubby v. United States,* 150 F2d 165, 5th Cir. 1945, where the defendant was charged with concealing and selling drugs, it was held that evidence of transaction similar to those charged in the indictment but subsequent thereto could not be used to supplement or strengthen evidence adduced to prove the substantive count. "Such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial . . . and to lead them unconsciously to render their verdict in accordance with their views of false issues. . . ." *Paris v. U.S.,* 260 F 529 at 531, 8th Cir. 1919.

Knowledge. Where a defendant admits he committed the crime but was unaware that a criminal act was being committed. This does not apply to the instant case.

Motive. This applies to evidence of other crimes in order to show defendant's state of mind. This would not be applicable.

Identity. Whether the particular defendant is the person who committed the act can be a consequential fact which might allow admission of evidence of similar crimes.

Plan or Design. Similar criminal activity has been admitted to show a plan or design.

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In the instant case the effect of admitting the proposed evidence would prejudice the defendant's rights and lead the jury to conclude these defendants are professional hi-jackers. The balance that must be observed in determining whether such evidence is admissible is whether its potential for prejudicing the defendant outweighs its probative value. *U.S. v. Papadakis*, 510 F2d 287, 294 (2nd Cir. 1975).

CONCLUSION

The proffered evidence of alleged subsequent similar acts of these defendants is not admissible in the trial of this action because there does not exist a sufficient question of intent to overcome the prejudice such evidence will create in the minds of the jurors.